Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-727

FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Petitioner,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Respondents.

REPLY BRIEF OF PETITIONER FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN

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Petitioner, Finley, Kumble, Wagner, Heine, Underberg & Grutman ("Finley, Kumble"), submits this brief in reply to the brief of respondents Charles Gross, Mabel Bleich, Gross & Co., and Jeanne Donoghue (the "Gross faction") submitted in opposition to its petition for a writ of certiorari.

Preliminary Statement

The Gross faction does not dispute the significance of the jurisdictional issues addressed in our petition for a writ of certiorari. Instead, it urges that these issues are not raised by this case and that the courts below did nothing more than routinely to apply the existing law.

Such arguments, we submit, reflect the Gross faction's inability to understand what actually happened in the courts below; by the device of cleverly pleaded defenses, unrelated to the merits of the narrow federal claim set forth in the complaint, the Gross faction engineered a federal forum for a host of non-federal counterclaims involving serious and untested issues of New York law, and compelled the joinder of 19 counterclaim defendants, none of whom were connected with the merits of the narrow federal claim in the complaint. In short, by an apparently innocuous procedural move, the Gross faction turned this simple federal case into a complex state law action and, in the process, accomplished an enormous and unwarranted expansion of federal court jurisdiction.

A. The petition accurately sets forth the relevant facts.

The Gross faction's myopia with respect to the issues in this case extends to its view of the statement of facts contained in the petition. We shall not burden the Court with a detailed rebuttal of its counter-statement of facts. Rather, we shall limit our response to brief comments upon the principal points made in its brief.

1. The Gross faction disputes (Gross br. 2) our contention that:

> It was the responsive pleadings which transmuted this simple federal case, involving four parties, into a cumbersome, protracted litigation of more than a dozen state claims involving two dozen non-diverse parties—most of whom had nothing to do with the original dispute. (Petition 7).

Despite the Gross faction's protestations to the contrary, it is evident that the original churning claim was quickly overwhelmed and swallowed up by the Gross faction's state law counterclaims. These state law counterclaims became, in the words of the District Court, "the heart of the proceeding".* (B. 62a) They consumed nearly all of a six week trial and of an appeal which generated a record in excess of 6,000 pages.

2. The Gross faction also challenges our assertion that the additional defendants on the counterclaims, including Finley, Kumble, were strangers to the original churning claim. (Gross br. 3) That challenge is misplaced. The nineteen additional counterclaim defendants who were forced into federal court simply had no connection with the trading accounts of Mr. and Mrs. Buckley. And the Gross faction's argument to the effect that most of these defendants were ultimately found liable on the state law counterclaims is wholly irrelevant to the issue of whether those counterclaims belonged in federal court in the first place.

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* References are to the appendices in our petition for certiorari.

3. The Gross faction's contention that there was some basis to its claim under the antitrust laws borders on the frivolous. Both the District Court and the Second Circuit flatly rejected its contentions that the so-called antitrust claim constituted a basis for pendent or any other kind of jurisdiction over the state law counterclaims. (A. 33a-34a) It has nowhere disputed the correctness of this conclusion.

4. The Gross faction's suggestion that its counterclaims did not raise novel and important questions of state law (Gross br. 5-6) is plainly wrong. The Second Circuit noted that there were no cases directly on point with respect to the scope of a partner's fiduciary duty. (A. 48a) And, the Court did not refer in its opinion to a single New York case which even remotely clarifies, in the context of this case, the difficult question of the scope of an attorney's liability to third persons for actions taken in furtherance of his role as counsel. (A. 48a)

5. The Gross faction's contention that this is not a case in which pleadings were engineered to provide the courts below with a jurisdictional base (Gross br. 6-7) has a hollow ring. It is clear beyond cavil that the Gross faction's defenses, upon which it was permitted to build an elaborate structure of state law counterclaims, were totally ignored throughout the case. Those defenses, in short, were unnecessary to a disposition of the churning claim; indeed, both the District Court and the Second Circuit considered and resolved the merits of that claim without a single reference to the defenses.

B. The state law counterclaims are not compulsory.

We argued in our petition that the Second Circuit misinterpreted Rule 13(a) of the Federal Rules of Civil Procedure and thereby extended its ancillary jurisdiction far beyond permissible limits. The Court found that the Gross faction's counterclaims were compulsory under Rule 13(a), not because they met any of the relevant standards applied in such cases by other circuit courts* (*See, e.g., Pipeliners Local Union No. 798, Tulsa Okla.* v. *Ellerd,* 503 F.2d 1193, 1198 (10th Cir. 1974); *see also Sue & Sam Mfg. Co.* v. *B-L-S Constr. Co.,* 538 F.2d 1048 (4th Cir. 1976)), but because "there was a substantial overlap between the defendants' defenses and their . . . counterclaims." (A. 30a)

In defense of this decision, the Gross faction cites a series of cases which, it argues, stands for the proposition that a counterclaim can be found compulsory on the basis of its connection to a defense.** (Gross br. 8-9) Its reliance on these cases is seriously misplaced.

In each of the cases cited, the counterclaim which was held to be compulsory, the defense to which it related, and

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* As described in our Petition, these criteria include (1) common issues of law or fact; (2) common evidence, (3) res judicata effect and (4) logical connection, between the plaintiff's claim and the counterclaim. (Petition 16-17)

** These cases include *TPO Incorporated* v. *Federal Deposit Insurance Corp.,* 487 F.2d 131 (3rd Cir. 1973); *The Kissel Company* v. *Farley,* 417 F.2d 1180 (7th Cir. 1969); *United States of America* v. *Haskins,* 505 F.2d 246 (9th Cir. 1974); *Sue & Sam Mfg. Company* v. *B-L-S Construction Co.,* 538 F.2d 1048 (4th Cir. 1976). It also cites the Second Circuit decision in *United Artists Corp.* v. *Masterpiece Productions,* 221 F.2d 213 (2d Cir. 1955).

the initial claim set forth in the complaint involved a common set of legal and factual issues. Any link which existed between the counterclaim and the defense was irrelevant; it was the link between the claim in the complaint and the counterclaim which made the counterclaim compulsory. Thus, in accordance with the language of Rule 13(a), the counterclaim in each of these cases arose "out of the transaction or occurrence that is the *subject matter of the opposing party's claim.*" (Emphasis added.) Here, that simply is not the case.

The Gross faction also erroneously contends that its counterclaims did arise out of the same set of facts—the same "transaction or occurrence"—as the churning claim. But the "subject matter" of the original claim was alleged churning of the Buckley's trading accounts between 1962 and 1966. The counterclaims, on the other hand, involved entirely different matters based upon events which occurred almost five years later. Moreover, the assignment of the Buckley's churning claim to the plaintiff Corporation plainly was not the "subject matter" of the claim. That assignment was entirely peripheral to the merits of the churning claim and was wholly unconnected to the merits of the state law counterclaims.

C. The principles of *Aldinger* v. *Howard* are applicable in this case.

Our petition squarely raises the issue of whether ancillary jurisdiction can be asserted over third parties for whom there is no independent basis of federal jurisdiction. (Petition 30) And we urged that this case presents the Court with an appropriate opportunity to apply to the sub-

ject of ancillary jurisdiction the policies recently enunciated in *Aldinger* v. *Howard*, 427 U.S. 1 (1976).

The Gross faction disagrees, contending that the decision in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), foreclosed the issue. (Gross br. 14-15) That is plainly wrong. As discussed in our petition, this Court in *Moor* did not decide whether an independent basis of federal jurisdiction is necessary for either pendent or ancillary jurisdiction over third parties.

In addition, the Gross faction argues that *Aldinger* is inapplicable here because it was disposed of on narrow grounds. That argument, we suggest, misses the overriding theme of *Aldinger;* that in light of constitutional and statutory limitations on the scope of federal jurisdiction, courts should be exceedingly cautious about expansion of federal jurisdiction over third parties for whom there is no independent basis of jurisdiction.

Finally, the Gross faction argues that *Aldinger* is not applicable because it involved issues of pendent, not ancillary jurisdiction, and that it therefore must be read as preventing only plaintiffs from improperly seeking to extend the scope of federal jurisdiction. That argument is meritless. *Aldinger's* articulation of appropriate limits of federal judicial power is equally applicable to cases in which third parties are brought in by defendants. Surely, defendants can bootstrap non-federal claims into the federal courts just as cleverly as plaintiffs. Indeed, for a blatant example of such tactics, one need look no further than this case.

Conclusion

We respectfully submit that Finley Kumble's petition for a writ of certiorari should be granted.

Dated: December 28, 1977

Respectfully submitted,

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